

DON'T BET ON IT? ECONOMIC AND LEGAL IMPLICATIONS OF LEGALIZED SPORTS BETTING AND DAILY FANTASY SPORTS IN THE UNITED STATES

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I. A BACKGROUND OF SPORTS BETTING

Throughout the history of human civilization, wherever there has been spectator sports, there has almost always been betting and wagering taking place around it, either in the open or in shadows.¹ Going back to ancient Roman times, it's easy to picture oneself amongst thousands in the stands of the Colosseum, watching small bets being placed by citizens all around you as the event of the day unfolds below. Dating clear back to these times, sports betting and gambling continues to be a common pastime both in the United States and abroad, with varying degrees of legality and government regulation in place. In the words of one state senator from California, "[s]ports betting is already legal today. Some people just have to travel farther than others in order to participate in this activity in a legal setting."²

One 2013 BBC article estimates that globally, the sports betting market "is worth anywhere between \$700bn and \$1tn," with 70% of that being wagered on soccer.³ In the United Kingdom, over 50,000 employees are employed in the sports betting industry.⁴ With over 16,000 legal betting

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¹ See Kristen M. Campion, *Riverboats: Floating Our Way to a Brighter Fiscal Future?*, 19 SETON HALL LEGIS. J. 564, 565 (1995) (citing Alice Fleming, *Something For Nothing: A History of Gambling*, 5-6 (1978)) ("Gambling has manifested itself in the Babylonian, Etruscan, Ancient Chinese, Egyptian, Roman, English, and American cultures. Cubical dice, six-sided cubes similar to today's dice, have been discovered in Egyptian tombs, circa. 2000 B.C. The New Testament mentions that the Roman soldiers guarding Jesus Christ's cross threw dice for his clothes. The Roman emperor Nero bet heavily on a single toss of dice.").

² Roderick D. Wright, *Making Sports Betting Legal Protects Bettors From Fraud, Theft*, U.S. NEWS & WORLD REP. (June. 15, 2012, 11:21 AM), <http://www.usnews.com/debate-club/should-sports-betting-be-legal/making-sports-betting-legal-protects-bettors-from-fraud-theft>.

³ Frank Keogh & Gary Rose, *Football betting - the global gaming industry worth billions*, BBC (Oct. 3, 2013), <http://www.bbc.com/sport/0/football/24354124>.

⁴ *Gambling Commission Industry Statistics – November 2015*, UK GAMBLING COMMISSION, <http://www.gamblingcommission.gov.uk/Gambling-data->

shops across the country in the 1960s after off-site betting was legalized in the 1960 Betting and Gaming Act, there are now only approximately 9,000 open, signaling a new era of online sports betting that takes place in a living room or pub on a tablet or cell phone, rather than betting done on-premises.⁵ What is certain is that, regardless of the means required to do so, there has virtually always been a market for those wishing to add a personal stake into the sports they are watching, whether under legal circumstances or not.

A. The Controversy of Sports Betting

Throughout the twentieth century and into the twenty-first, there have been several high-profile gambling-related scandals to shake the public's trust in the sports they have always watched in droves. Some of the most well-known incidents include the Black Sox Scandal of 1919, a college basketball point shaving scandal at Boston College in 1978-79, the discovery that baseball's all-time hit leader, Pete Rose, had bet on baseball, and the NBA's Tim Donaghy scandal of 2008.⁶ European sports, and soccer in particular, have seen a wide share of scandals and match fixing as well. In 2009, European soccer was hit with what many deemed to be its biggest match-fixing scandal ever, with around 200 matches across nine countries implicated.⁷ Included in the 200 matches were three UEFA Champions League matches and twelve UEFA Europa League matches, the two most prestigious and lucrative soccer club competitions in the world.⁸

analysis/statistics/Industry-statistics.aspx (follow Gambling industry statistics April 2008 to March 2015 - Excel version hyperlink).

⁵ Kirby Garlitos, *Online Gambling in the UK Up 80 Percent Since 2008*,

CALVINAYRE.COM (Mar. 27, 2013),

[http://calvinayre.com/2013/03/27/business/online-gambling-in-the-uk-up-80-](http://calvinayre.com/2013/03/27/business/online-gambling-in-the-uk-up-80-percent-since-2008/)

[percent-since-2008/](http://calvinayre.com/2013/03/27/business/online-gambling-in-the-uk-up-80-percent-since-2008/); see also Graham Rock, *Gambling A-Gogo*, THE GUARDIAN

(Apr. 28, 2001, 9:32 PM EDT),

<http://www.theguardian.com/sport/2001/apr/29/comment.theobserver> (“[A]nd by the mid-1960s local magistrates had granted an estimated 16,000 licences.”).

⁶ Jeffrey Roeske, *Doubling Down on Sports Gambling: Why PASPA Would Fail a Constitutional Challenge*, 24 MARQ. SPORTS L. REV. 463, 463 (2014); see also

Howard Beck & Michael S. Schmidt, *N.B.A. Referee Pleads Guilty to Gambling Charges*, N.Y. TIMES (Aug. 16, 2007),

http://www.nytimes.com/2007/08/16/sports/basketball/16nba.html?_r=0.

⁷ Owen Gibson, *Europe Hit by “Biggest-ever” Match-fixing Scandal*, THE GUARDIAN (Nov. 20, 2009, 2:18 PM),

<http://www.theguardian.com/sport/2009/nov/20/uefa-match-fixing-germany>.

⁸ *Id.*; see also Monte Burke, *The Ten Richest Sporting Events In The World*,

FORBES (May 24, 2012, 9:48 AM),

<http://www.forbes.com/sites/monteburke/2012/05/24/the-ten-richest-sporting-events-in-the-world/> (As of 2012, the UEFA Champions League was the richest sporting event in the world, with \$77 million paid out to the competition's winner.).

Additionally, Europol, the European Union's law enforcement agency, conducted a nineteen-month investigation ending in 2013, referred to as Operation VETO, which revealed "widespread occurrences of match-fixing in recent years, with 680 games globally deemed suspicious."⁹ Many of these games took place in Latin America, Africa, and South America, but more prestigious competitions, including the UEFA Champions League, were once again implicated.¹⁰ In January 2016, BBC and BuzzFeed released reports on potential match fixing in tennis, stating that over the previous decade, "16 players who have been ranked in the top 50 have been repeatedly flagged to the Tennis Integrity Unit (TIU) over suspicions they have thrown matches."¹¹ The global nature of these scandals demonstrates that match-fixing and other corruption in sports can take place anywhere, regardless of whether gambling on sports is legal or illegal in a particular place.

Unlike the United Kingdom, legal sports betting in the United States has been limited, with few exceptions, to more traditional sports such as horse racing and boxing, and has only been permitted onsite in most states.¹² A major change came in 1978, when the Interstate Horseracing Act passed through Congress and was signed by President Carter, legalizing "off-track wagering" of horse races, provided certain rules were followed, and delegated the ultimate decision of legality to the States.¹³ The underlying purpose of this Bill was to "regulate interstate commerce," and "to maintain the stability of the horseracing industry" that had grown stagnant in recent decades.¹⁴ Again, despite opposition from the Justice Department and mostly Republican members of Congress, this Act was amended in 2000 to loosen the definition of the term "interstate wagering" to include wagers made by telephone or via the Internet, targeting the emerging online gambling market.¹⁵

Also worth considering is the recent trend and proliferation of fantasy sports and its progeny, daily fantasy sports (DFS). From humble beginnings

⁹ Sam Borden, *Police Call Match-Fixing Widespread in Soccer*, N.Y. TIMES (Feb. 4, 2013), http://www.nytimes.com/2013/02/05/sports/soccer/investigation-finds-suspected-fixing-in-680-soccer-matches.html?_r=0.

¹⁰ *Id.*

¹¹ Simon Cox, *Tennis match fixing: Evidence of suspected match-fixing revealed*, BBC (Jan. 18, 2016), <http://www.bbc.com/sport/tennis/35319202>.

¹² See Wayne Parry, *Why Online Gambling is Still Illegal in Most U.S. States*, HUFFINGTON POST (Nov. 25, 2015, 3:56 PM), http://www.huffingtonpost.com/entry/why-online-gambling-is-still-illegal-in-most-us-states_us_5656186fe4b08e945feae70b.

¹³ 15 U.S.C. § 3001 (1978).

¹⁴ 15 U.S.C. § 3004 (1978).

¹⁵ See Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 410 (2002).

in the 1980s with the advent of the rotisserie baseball league, fantasy sports have grown, with the help of the Internet in the 1990s, into a massive global industry, with fantasy NFL football leading the way.¹⁶ In the United States and Canada, the estimated number of fantasy sports players by year has grown from 500,000 in 1988 to 56,800,000 in 2015.¹⁷ The DFS industry as a whole creates an interesting contrast to historical sports betting and will be examined in greater detail in the later sections.

B. PASPA and UIGEA

Following the highly publicized Pete Rose scandal in Major League Baseball and his subsequent lifetime ban from the sport, Congress was heavily pressured by professional sports organizations along with the NCAA to come down hard on sports betting.¹⁸ With the topic in the public opinion limelight, Congress took notice and drafted the Professional and Amateur Sports Protection Act (PASPA) in 1991.¹⁹ Factors often cited were maintaining the integrity of athletes and the proliferation of gambling among the nation's youth.²⁰ Senator Bill Bradley, a former professional basketball player himself and cosponsor of the bill, helped lead this charge and authored an article for the Seton Hall Journal of Sports Law heavily emphasizing gambling as a problem for teenagers in the United States:

Legalized sports betting would teach young people how to gamble. This, in turn, would lead these children to illegal gambling once they discover that the odds and pay-offs are better. Many children look up to athletes. These players could not possibly serve as proper role models if they were entangled in the gambling enterprise. Legalizing sports

¹⁶ See Marc Edelman, Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law, 2016 U. ILL. L. REV. 117, 121 (2016).

¹⁷ Pras Subramanian, 5 Surprising Stats About Fantasy Sports, YAHOO! FINANCE (Sept. 4, 2013, 11:43 AM), <http://finance.yahoo.com/blogs/breakout/5-surprising-stats-fantasy-sports-154356461.html>; see also NUMBERS AT A GLANCE, FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> (last visited Apr. 1, 2016);

¹⁸ See Jason J. Ranjo, Game Over?: The Potential Demise of the Professional and Amateur Sports Protection Act, 42 RUTGERS L. J. 213, 214 (2010) (citing Thomas J. Ostertag, From Shoeless Joe to Charley Hustle: Major League Baseball's Continuing Crusade Against Sports Gambling, 2 SETON HALL J. SPORTS L. 19, 19-21 (1992)).

¹⁹ See Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (1992).

²⁰ Sen. Bill Bradley, The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474, 2 SETON HALL J. SPORTS L. 5, 7 (1992).

gambling would encourage young people to participate in sports to win money. They would no longer love the game for the purity of the experience.²¹

After hearings were held for the bill, the Senate Judiciary Committee found that sports betting was a national problem and that the “‘bill serves an important public purpose, to stop the spread of State-sponsored sports gambling’ and the promotion of gambling among our youth.”²²

PASPA made its way through Congress and was signed into law by the President on October 28, 1992.²³ Excluding animal racing and jai alai, the Act effectively banned all sports betting in all states except for Nevada, Oregon, Delaware, and Montana, stating:

It shall be unlawful for --

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.²⁴

However, keeping New Jersey and Atlantic City in mind, the law did create a loophole in which a state where casino gaming had been legal during the previous ten years could legalize sports betting within one year of the Act's passage.²⁵ Another exception was included for municipalities with continuous casino gambling for the ten prior years to adopt sports betting legislation within one year.²⁶ Atlantic City was the only city in the country that fit this bill.²⁷ With these exceptions put in place, it was clear Congress intended to give New Jersey and Atlantic City an opportunity to carve out a niche market for themselves on the East Coast similar to the one already existing in Nevada.

²¹ *Id.*

²² *Id.* at 9 (citing S. Rep. No. 102-248, at 4-5 (1991)).

²³ Sports Betting Act, *supra* note 19.

²⁴ See 28 U.S.C. § 3702 (1992).

²⁵ See 28 U.S.C. § 3704(a)(3) (1992).

²⁶ 28 U.S.C. § 3704(a)(3) (1992).

²⁷ Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey - A History*, N.J. LAWYER, Apr. 2013, at 22.

After PASPA was adopted, the New Jersey Senate attempted to place a referendum on the ballot to authorize sports betting legislation in the state's constitution within the yearlong exception, but the authorizing resolution never made it to the floor for a vote.²⁸ The state-level debate pitted professional sports leagues, the NCAA, church groups, and law enforcement agencies against the Casino Association of New Jersey and Donald Trump, who saw much to gain with his investments in Atlantic City.²⁹ A bill was introduced and passed through the State Senate, but faltered when presented to the State Assembly.³⁰ In the summer of 1993, a second attempt was made to legalize betting exclusively on professional games, and not collegiate sports, but this version also died in the same committee as the one before it.³¹ The door for legal sports betting in New Jersey had seemingly been shut.

In 2006, the United States Government went a step farther, passing the Unlawful Internet Gambling Enforcement Act (UIGEA).³² This legislation was brought forth as an effort "to curtail the rise of sports-betting websites by preventing banks and other financial institutions from transmitting funds from the United States to internet casinos and to make lotteries based on sports events illegal."³³ In particular, Congress found that, "[n]ew mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders," and that "[i]nternet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry."³⁴ However, it appears that UIGEA has been ineffective in curtailing the proliferation of Internet sports betting, as evidenced by its current widespread popularity.³⁵

²⁸ *Id.* at 23.

²⁹ See Brent Johnson, *The story of when N.J. almost legalized sports betting in 1993*, NJ.COM (Mar. 15, 2015, 6:00 AM), http://www.nj.com/politics/index.ssf/2015/03/the_story_of_njs_missed_opportunity_on_sports_bett.html.

³⁰ *Id.*

³¹ *Id.*

³² See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006).

³³ Dylan Oliver Malagrino, *Off the Board: NCAA v. Christie Challenges Congress to "Move the Line" on the Professional and Amateur Sports Protection Act*, 118 PENN ST. L. REV. 375, 379 (2013) (citing 31 U.S.C. §§ 5361-5367 (2006)).

³⁴ 31 U.S.C. § 5361(a)(3)-(4) (2006).

³⁵ Malagrino, *supra* note 33 (Citing Representative Jim McDermott Labels UIGEA a Failure and Calls for Regulation POKERROOMREVIEW (Jan. 31, 2008), <http://pokerroomreview.com/poker-news/representative-jim-mcdermott-labels-uigea-a-failure-and-calls-for-regulation/>) ("A PricewaterhouseCoopers study found that UIGEA is a failure because millions of Americans continue to gamble online

Rather than being ignored, this popularity should be embraced as a potential tool of economic gain for states and municipal governments.

II. THE ECONOMICS OF GAMBLING IN NEW JERSEY

Atlantic City has typically been considered the gambling capital of the East Coast, but this was not always the case. In 1897, a voter-approved referendum amended the state constitution to ban gambling in all forms.³⁶ Although the gambling ban was still in effect at the time, Atlantic City first rose to a reputation as a playground of sorts for adults during the Prohibition era under the rule of political boss Enoch Johnson, when corruption, gambling, drinking, and prostitution all ran prevalent in the city.³⁷

Despite all of its success during this time, Atlantic City went into an extended period of decline in the decades following World War II, caused by multiple factors.³⁸ Advanced means of transportation meant vacationers from the nearby metropolitan areas had many more options nearby via automobile, or farther away via plane.³⁹ As tourists began travelling elsewhere, the corresponding job market began to shrink as well.⁴⁰ Between 1960 and 1980, the city's population fell from nearly 60,000 to just above 40,000, with nonelderly white families being the most likely residents to depart.⁴¹

Looking for a way to differentiate itself as a destination and to jumpstart new tourism revenues, gambling advocates began pushing for a new referendum to legalize casino gambling in New Jersey.⁴² A referendum directed to legalize casino gambling throughout the entire state failed in 1974, so a new referendum was pushed in 1976 for legalization exclusively in Atlantic City, with the primary purpose of revitalizing the city and its

every single day, and there has been an increase in online gaming participation by Americans despite UIGEA.”).

³⁶ *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 580, 610 (1971).

³⁷ See Special to the New York Times, *Enoch L. Johnson, Ex-Boss in Jersey: Prohibition-Era Ruler of Atlantic City*, 85, *Dies*, N.Y. TIMES, Dec. 10, 1968, at 47 (“We have whisky, wine, women, song and slot machines. I won’t deny it and won’t apologize for it.”); see also *Nucky’s Empire: The Prohibition Years*, THE ATLANTIC CITY FREE PUBLIC LIBRARY, <http://atlanticcityexperience.org/collections-exhibit/exhibit-nucky-johnson-prohibition> (last visited Apr. 2, 2016) (“In Atlantic City, Prohibition was essentially unenforced by the local authorities.”).

³⁸ See HARRIET NEWBURGER ET AL., ATLANTIC CITY: PAST AS PROLOGUE 9-10 (Federal Reserve Bank of Philadelphia ed., 2009).

³⁹ *Id.*

⁴⁰ See *id.* at 10.

⁴¹ *Id.* at 10.

⁴² *Id.* at 11.

famous Boardwalk.⁴³ The new referendum passed with relative ease, and in the following year, the state legislature passed the Casino Control Act to govern the establishment and operation of the new casinos that were to be built.⁴⁴ Among the goals of the Casino Control Act was for it to use gambling as a “unique tool” to support urban redevelopment within the city.⁴⁵ To do this, casinos were initially required to reinvest 2% of their adjusted gross revenues into urban development, but this effort was lost in the form of a loophole that allowed the casinos to hold onto these revenues for a time before paying taxes on them to the state.⁴⁶

In 1978, the Resorts International became the first casino to open in Atlantic City, and by 1987, there were twelve fully operational casinos, a number that remained unchanged until 2006.⁴⁷ During the period between 1978 and 1985, overall gaming in Atlantic City saw an average annual growth of 55.07%.⁴⁸ Over the next twenty years, annual growth was much more modest at 4.37%.⁴⁹ In the late 1980s, real estate mogul Donald Trump, who bought the Taj Mahal casino in 1988, brought many high profile boxing matches and the Boardwalk reached its peak in popularity towards the end of the decade.⁵⁰ This heyday led up to the time of PASPA’s enactment, so the necessity for any change or additional legalization may not have been as evident during the yearlong exemption period. Despite all of the tourism revenues and job creation resulting from the new gambling industry, urban development still lacked, due largely in part to the revenues bypassing any revitalization efforts.⁵¹ As of August 2015, Atlantic City had an unemployment rate of 7.3%, nearly 60% above the national average of 4.8%.⁵²

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 12.

⁴⁷ *Id.*

⁴⁸ David G. Schwartz. Atlantic City Gaming Revenue: Statistics for Casino, Slot, and Table Win, 1978- 2015, LAS VEGAS: CENTER FOR GAMING RESEARCH, UNIVERSITY LIBRARIES, UNIVERSITY OF NEVADA LAS VEGAS (2016).

⁴⁹ *Id.*

⁵⁰ Nina J. Easton, Merv Griffin's Outrageous Fortune: When Millionaire Griffin Took on Billionaire Trump, They Said It Was a Mismatch. They Were Wrong., L.A. TIMES, July 24, 1988, http://articles.latimes.com/1988-07-24/magazine/tm-10039_1_merv-griffin; Earl Gustkey, Trump Pays \$11 Million for Tyson vs. Spinks Bout, L.A. TIMES (Feb. 25, 1988), http://articles.latimes.com/1988-02-25/sports/sp-45056_1_las-vegas.

⁵¹ See NEWBURGER ET AL., *supra* note 38, at 12.

⁵² U.S. BUREAU OF LABOR STATISTICS, ATLANTIC CITY AREA ECONOMIC SUMMARY (2015).

A. Recent Decline

Even a decade after the legalization of casino gambling in New Jersey, some still viewed Atlantic City as a ruined city, manifested by the fact that while the Boardwalk had reclaimed its glitz and glamor, the rest of the city was still dilapidated and impoverished.⁵³ As the gambling industry moved into the 21st century, various factors, similar to those affecting it after World War II, have contributed to Atlantic City's decline as a tourist destination and casino center. Between 2007 and 2015, the industry in the city has seen an average annual decline of 7.56%.⁵⁴ During this time, Las Vegas has seen major redevelopment and an increase in national popularity, and casino gambling has been legalized in other states nearby and throughout the country, including Connecticut and just across the state border in Pennsylvania.⁵⁵ With other options available to tourists, Atlantic City has failed to carve out a new niche to diversify itself away from solely casino gaming. In 2014 alone, four of Atlantic City's casinos closed their doors, taking 8,000 jobs along with them.⁵⁶ It is hoped that these closures will be the last; the eight surviving casinos did see gross operating profits increase by 44% with the competition now whittled down.⁵⁷ But with this loss of economic activity and a problem that doesn't appear to be going anywhere, the question for Atlantic City once again becomes one of finding a new way to adapt to new but familiar economic realities.

B. Sports Betting as a Possible Solution

Finding itself yet again in need of something to differentiate itself from new competition and to drive more revenues into the state, sports betting became an increasingly appealing possibility for New Jersey to build into its well-established gambling infrastructure. New Jersey has made several attempts in recent years, via various routes, to pave the way for legalized sports betting within the state.

In 2011, New Jersey voters approved, by nearly a 2-to-1 margin, a referendum to amend the state Constitution to partially repeal the ban on sports betting that had been in place.⁵⁸ In this referendum, it was suggested

⁵³ NEWBURGER ET AL., *supra* note 38, at 11.

⁵⁴ Schwartz, *supra* note 48.

⁵⁵ Campion, *supra* note 1, at 572.

⁵⁶ Wayne Parry, Associated Press, *City Casino Industry Grew Operating Profit 44 Percent*, FOX BUSINESS (Apr. 7, 2015), <http://www.foxbusiness.com/markets/2015/04/07/as-4-its-12-casinos-closed-atlantic-city-casino-industry-grew-operating-profit/>.

⁵⁷ *Id.*

⁵⁸ Wayne Parry, *NJ Voters: We Want to Bet on Sports if US Says Yes*, BLOOMBERG BUSINESS, Nov. 9, 2011, <http://www.businessweek.com/ap/financialnews/D9QT8KIG0.htm>.

that sports betting should be allowed in Atlantic City casinos and several other horse racetracks across the state.⁵⁹ The amendment made it possible for “the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.”⁶⁰ Following the 2011 referendum, the state legislature enacted legislation in 2012 that legalized and regulated sports gambling at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams.⁶¹ Upon the enactment of this Sports Wagering Law, state Assemblyman John Burzichelli made a public statement echoing past and current sentiment, stating, “sports gaming is already taking place, but the only people taking advantage of it are bookies and criminal enterprises. This opens the door for New Jersey to implement well-regulated sports gambling.”⁶²

Aiming to address the underlying economic and urban blight issues that necessitated the need for a change in the first place, the legislators who pushed for the amendment also laid out tax guidelines for these future revenues.⁶³ Most of the tax revenue was to be used to fund senior citizen and disability programs, while economic and community development projects and gambling addiction treatment programs would also see a share of the revenue.⁶⁴

As seemingly well thought out as this plan for legal sports betting was that began taking shape, there was no mistaking that the state would still need to address the new law’s conflicting stance with PASPA. In a bipartisan effort to bypass PASPA directly, two congressmen from New Jersey presented two separate bills to the U.S. House of Representatives.⁶⁵ The first of these bills would have explicitly exempted New Jersey from PASPA, while the other would have provided all states with a four-year window to legalize sports betting.⁶⁶ In a press release announcing the effort, Congressman Frank LoBiondo explained, “New Jersey has been clear about

⁵⁹ *Id.*

⁶⁰ N.J. CONST. art. IV, § 7.

⁶¹ See *NCAA v. Christie*, 61 F. Supp. 3d 488, 491 (D.N.J. 2014).

⁶² *Id.*

⁶³ Sports Gaming Opportunity Act of 2012, H.R. 3797, 112th Cong. (2012).

⁶⁴ *Id.*

⁶⁵ Reps. Pallone & LoBiondo Team Up to Bring Sports-Gaming to New Jersey, (Feb. 13, 2013), <https://pallone.house.gov/press-release/pallone-lobiondo-team-bring-sports-gaming-new-jersey>.

⁶⁶ *Id.*

its intent to host sports-betting. Legalizing sports-betting would strengthen Atlantic City in the face of stiff competition, giving it an additional edge to attract visitors and critical tourism dollars.”⁶⁷ Unfortunately for their efforts, neither bill managed to make it out of committee.⁶⁸ Despite New Jersey’s failure to spark change at the federal level, in 2011 the die was cast when the New Jersey Legislature amended its state constitution to permit gambling “on the results of any professional, college, or amateur sport or athletic event except collegiate games involving New Jersey colleges or venues.”⁶⁹ Moving along these lines, New Jersey enacted the Sports Wagering Law in 2012, which authorized gambling on sporting events pursuant to the amendment’s structure and limitations.⁷⁰ With New Jersey law now in official defiance of a federal statute, the foundation for future years of litigation was set.

III. THE LEAGUES AND NEW JERSEY SQUARE OFF

On August 20, 2012 and within a year of New Jersey’s new amendment being adopted, the National Basketball Association, the National Football League, the National Hockey League, Major League Baseball, and the National Collegiate Athletic Association brought an action in the United States District Court for the District of New Jersey against Governor Chris Christie seeking to enjoin the New Jersey amendment’s implementation.⁷¹ In their complaint, the sole injury specified was that the new amendment was in violation of PASPA.⁷² From a policy perspective, the Leagues echoed some of the same justifications that had been used in PASPA’s enactment, citing, “[p]laintiffs have consistently opposed legalizing sports gambling in other states and at the federal level because it undermines the public’s faith and confidence in the character of amateur and professional team sports,” and, “[a]mateur and professional sports are an integral part of American culture, particularly among the country’s youth who often look up to athletes as role models.”⁷³

In holding that the leagues had brought forward sufficient injury-in-fact to claim injunctive relief and made an adequate show of standing, the Court

⁶⁷ *Id.*

⁶⁸ H.R. 3797 (112th): Sports Gaming Opportunity Act of 2012, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/hr3797#>; see also H.R. 3809 (112th): New Jersey Betting and Equal Treatment Act of 2012, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/hr3809>.

⁶⁹ See *NCAA v. Christie*, No.12-4947, 2012 WL 6698684, at *2 (D.N.J. Dec. 21, 2012) (citing N.J. CONST. art. IV, § 7).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Compl. for Declaratory and Injunctive Relief, *NCAA v. Christie*, No.12-4947 (D.N.J. Aug. 7, 2012).

⁷³ *Id.*

looked to three separate studies, two conducted by the NBA and one by the NCAA, that among other things, cited 2.8% of football players being asked to affect the outcome of games and claimed that 38% of respondents in a national survey would be opposed to legalized gambling throughout the United States.⁷⁴

On February 28, 2013, the case was decided in the same District of New Jersey Court in favor of the leagues, granting them a permanent injunction against New Jersey.⁷⁵ New Jersey had alleged that PASPA was in violation of the Commerce Clause, the Tenth Amendment, the Due Process Clause and Equal Protection Principles, and the Equal Footing Doctrine.⁷⁶ PASPA was found to be constitutional and not in violation of any of these principles, thus rendering New Jersey's amendment invalid through the Supremacy Clause.⁷⁷ Using the rational basis test, the Court looked to the Senate Judiciary Committee that introduced PASPA and the Department of Justice's position that interstate commerce would be impacted by legalized sports betting.⁷⁸ Of notable importance for the most recent decision in this litigation battle, the Court found that PASPA had not violated Anti-Commandeering Principles flowing from the Tenth Amendment because it "neither compels nor commandeers New Jersey to take any action."⁷⁹ Along with this, it explained, "[n]o *action* on the part of the States is *required* in order for PASPA to achieve its ends, namely, restriction of the spread of state authorized sports wagering. In short, PASPA is controlling and influencing the spread of legalized sports wagering, not New Jersey."⁸⁰

Following an appeal to the United States Court of Appeals for the Third Circuit, an affirming opinion was filed on September 17, 2013.⁸¹ In this decision, the Court seemed well aware of the changing tide in public sentiment regarding the controversy of sports betting, explaining in its introduction:

We are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity—engender strong views. But we are not asked to judge the wisdom of PASPA or of New Jersey's law, or of the desirability of the

⁷⁴ NCAA v. Christie, *supra* note 69, at *6-7.

⁷⁵ NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013).

⁷⁶ *Id.* at 554.

⁷⁷ *Id.* at 579.

⁷⁸ *Id.* at 560.

⁷⁹ *Id.* at 561.

⁸⁰ *Id.* at 572.

⁸¹ NCAA v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

activities they seek to regulate. We speak only to the legality of these measures as a matter of constitutional law. Although this “case is made difficult by [Appellants'] strong arguments” in support of New Jersey's law as a policy matter, *see Gonzales v. Raich*, 545 U.S. 1, 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), our duty is to “say what the law is,” *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).⁸²

Also acknowledged by the Court was a brief filed by a co-party to New Jersey, which noted that “[o]ver the course of the next two decades (after PASPA) . . . the views of the New Jersey voters regarding sports wagering evolved.”⁸³ However, it ruled that nothing in PASPA was in violation of the U.S. Constitution, and that agreeing with New Jersey's arguments would result “in significant changes to the day-to-day operation of the Supremacy Clause in our constitutional structure.”⁸⁴

Despite the Third Circuit's affirmation, the opinion was notably the first in this battle to be accompanied by a dissent. In an opinion that would be echoed in the most recent decision, Judge Thomas Vanaskie dissented in part on the grounds that PASPA violated principles of federalism as articulated by the Supreme Court by “essentially giv[ing] the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling.”⁸⁵ However, he did join the majority's opinion that PASPA was not in violation of the “equal sovereignty” principle.⁸⁶ Vanaskie looked to previous cases *United States v. New York* and *Printz v. United States* to articulate what he believed to be a clear standard:

[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does

⁸² *Id.* at 215.

⁸³ *Id.* at 217.

⁸⁴ *Id.* at 240.

⁸⁵ *Id.* at 241.

⁸⁶ *Id.*

not authorize Congress to regulate state governments' regulation of interstate commerce.⁸⁷

Additionally, the dissent was also concerned that "PASPA implicates the political accountability concerns voiced by the Supreme Court in *New York* and *Printz*."⁸⁸ Going on, Judge Vanaskie explained, "[a]lthough PASPA does not 'direct the States to regulate,' or 'implement a federal regulatory program,' its prohibition on state authorization and licensing of sports gambling similarly diminishes the accountability of federal officials at the expense of state officials. Instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities."⁸⁹ The dissent then began to conclude that "no case law supports permitting Congress to achieve federal policy objectives by dictating how states regulate sports gambling," and "no legal principle exists for finding a distinction between the federal government compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting state governments from exercising their sovereignty to enact or enforce laws on the other."⁹⁰ Finally, the Judge held:

Congress may "encourage a State to regulate in a particular way," *New York*, 505 U.S. at 166, even in areas outside the scope of Congress's Article I, § 8 powers—by "attach[ing] conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206-07, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). But, what Congress may not do is "regulate state governments' regulation." See *New York*, 505 U.S. at 166. Whether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court "has been explicit" that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."⁹¹

Even though the dissent agreed with the majority regarding the equal sovereignty doctrine, it has been argued elsewhere that, under an expanded equal sovereignty as directed by *Shelby County v. Holder* in 2013, PASPA

⁸⁷ *Id.* at 245; see also *United States v. New York*, 505 U.S. 144 (1992); see also *Printz v. United States*, 521 U.S. 898 (1997).

⁸⁸ *Id.*

⁸⁹ *Id.* at 246 (internal citations removed).

⁹⁰ *Id.* at 250.

⁹¹ *Id.*

has become unconstitutional.⁹² In *Shelby County*, the U.S. Supreme Court concluded that the equal sovereignty doctrine requires a federal legislation's disparate impact among states to have a sufficient relationship to its targeted problems, and the note's author posited that, due to the proliferation of fantasy sports and illegal sports betting, PASPA no longer had the requisite sufficient relationship to its targeted problems.⁹³

A. 2014: Another Win for the Leagues

In response to the prior rulings against it, on October 17, 2014, New Jersey “enacted legislation repealing the 2012 Law and other provisions of state law related to gaming insofar as they bar sports wagering in certain contexts.”⁹⁴ The same District Court of New Jersey that held for the leagues in 2012 did so again and granted a permanent injunction, citing the Congressional intent behind PASPA and holding that partially repealing a ban was in fact an authorization for sports betting for all intents and purposes.⁹⁵ In its introduction, the Court conceded that there are other states that may be looking to join New Jersey in its efforts to bypass PASPA.⁹⁶ The Court continued in agreement with the Third Circuit, stating, “the Third Circuit's finding of congressional purpose support[s] the conclusion that PASPA preempts the type of *partial repeal* New Jersey is attempting to accomplish in the 2014 Law, by allowing some, but not all, types of sports wagering in New Jersey, thus creating a label of legitimacy for sports wagering pursuant to a state scheme.”⁹⁷ It directly addressed the 2014 Law by claiming that it clearly had been crafted in an attempt to evade PASPA, and in response, held, “[i]n the context of a preemption analysis, federal courts have been unwilling to allow states to do indirectly what they may not do directly.”⁹⁸ The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word,” nor can it “be evaded by formalism,” which would only “provide a roadmap for States wishing to circumvent federal law...and the Court cannot ignore Congress's intent in enacting PASPA just because New Jersey carefully styled the 2014 Law as a repeal.”⁹⁹ Finally, the Court looked at the legislative history in New

⁹² See Michael Welsh, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, 55 B.C. L. REV 1009 (2014); see also *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630 (2013).

⁹³ *Id.*

⁹⁴ See *NCAA v. Christie*, *supra* note 61, at 491.

⁹⁵ *Id.* at 488-508.

⁹⁶ *Id.* at 492.

⁹⁷ *Id.* at 504.

⁹⁸ *Id.*

⁹⁹ *Id.* at 504-05 (citing *Howlett v. Rose*, 496 U.S. 356, 382-83 (1990) and *Haywood v. Drown*, 556 U.S. 729, 742 (2009)).

Jersey relating to PASPA, and concluded that “New Jersey’s attempt to allow sport wagering in only a limited number of places, most of which currently house some type of highly regulated gambling by the State, coupled with New Jersey’s history of attempts to circumvent PASPA, leads to the conclusion that the 2014 Law is in direct conflict with the purpose and goal of PASPA and is therefore preempted.”¹⁰⁰

B. 2015: Most Recent Appeal

New Jersey appealed the 2014 ruling but lost again in the Third Circuit of Appeals; the ruling was the second between the parties to include a dissent, this one being particularly persuasive. The majority cited three main reasons why New Jersey’s “repeal” violated PASPA:

The New Jersey statute violated PASPA because it authorized by law sports gambling. The statute authorized casinos and racetracks to operate sports gambling while other laws prohibited sports gambling by all other entities, and it authorized sports gambling by selectively dictating where sports gambling may occur, who could place bets, and which athletic contests were permissible subjects.¹⁰¹

It went on, explaining, “[t]he presence in the New Jersey statute of the word “repeal” did not change the fact that the statute selectively granted permission to certain entities to engage in sports gambling,” and “[t]he New Jersey statute’s construction provision, N.J. Stat. Ann. § 5:12A-8, could not evade the Supremacy Clause.”¹⁰² Lastly, the Court held that “selectiveness constitutes specific permission and empowerment,” which made it incompatible with PASPA.¹⁰³ Rejecting New Jersey’s argument that the Court had created a “false equivalence between repeal and authorization,”¹⁰⁴ the majority held:

The presence of the word “repeal” does not prevent us from examining what the provision actually does, and the Legislature’s use of the term does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey’s sports gambling prohibitions remain and no one may engage in such conduct save those listed by the 2014 Law...While

¹⁰⁰ *Id.* at 506.

¹⁰¹ *NCAA v. Governor of New Jersey*, 799 F.3d 259, 259 (3d Cir. 2015).

¹⁰² *Id.*

¹⁰³ *Id.* at 266.

¹⁰⁴ *Id.* at 262 (citing *NCAA v. Governor of N.J.*, 730 F.3d 208, 233).

artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is not a repeal; it is an authorization.¹⁰⁵

One key distinction the Third Circuit did make was that, had the 2014 law repealed all prohibitions on sports gambling and not only selectively, the law would've been difficult to overturn.¹⁰⁶ This relates back to the dissent in *Christie I*, where Judge Vanaskie pointed out that such regulation would violate anti-commandeering principles.¹⁰⁷

1. An Important Dissent

In the dissenting opinion, Circuit Judge Fuentes took issue with how the majority handled the repeal, mainly in part because, “[when] a statute is repealed, ‘the repealed statute, in regard to its operative effect, is considered as if it had never existed.’”¹⁰⁸ This, in effect, leaves the sports wagering law in those affected areas virtually the same as it would've been had the Legislature made a complete repeal. Fuentes contended that, by holding the partial repeal of sports wagering prohibition to be the same as an “authorization,” the majority embraced the “false equivalency” that the same Court rejected in *Christie I*.¹⁰⁹ He goes on to cite the explanation provided by the *Christie I* majority:

that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to 'authorize [it] by law' [T]he . . . Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering.¹¹⁰

Fuentes used this to emphasize the majority's rationale that a partial repeal is to be treated differently from a total repeal, a conclusion he found to be entirely unfounded in common law. Under the majority's logic, “New

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *NCAA v. Governor of N.J.*, 730 F.3d 208, 245-51 (Vanaskie, J., dissenting).

¹⁰⁸ *Id.* at 269.

¹⁰⁹ *Id.*

¹¹⁰ *NCAA v. Governor of New Jersey*, 799 F.3d at 270.

Jersey is left with no choice at all—it must uphold all prohibitions on sports wagering in perpetuity or until PASPA is no more. This is precisely the opposite of what we held in *Christie I*—“[n]othing in these words *requires* that the states keep any law in place”—and why we found PASPA did not violate the anti-commandeering principle.”¹¹¹

The dissent was also critical of the majority for analogizing the 2014 Law to the exception Congress had originally offered to New Jersey in PASPA. In Fuentes’ opinion, Congress merely prohibited sports wagering pursuant to state law, and “with this exception, New Jersey could have “sponsor[ed], operate[ed], advertise[ed], promote[ed], license[ed], or authorize[ed] by law or compact” sports wagering.”¹¹² Under the 2014 Law, of course, New Jersey cannot and does not aim to do any of these things.”¹¹³ Instead of comparing the 2014 Law to PASPA’s exception for New Jersey, the dissent made a compelling point by comparing it to the 2012 Law passed by the New Jersey legislature:

The 2012 Law lifted New Jersey's ban on sports wagering and provided for the licensing of sports-wagering pools at casinos and racetracks in the State. Indeed, New Jersey set up a comprehensive regime for the licensing and close supervision and regulation of sports-wagering pools. For instance, the 2012 Law required any entity that wished to operate a “sports pool lounge” to acquire a “sports pool license.” To do so, a prospective operator was required to pay a \$50,000 application fee, secure DGE approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from DGE and the Casino Control Commission. In addition, the regime required entities to, among other things, submit extensive documentation to DGE, to adopt new “house” rules subject to DGE approval, and to conform to DGE standards. This violated PASPA in the most basic way: New Jersey developed an intricate scheme to both authorize (*by law*) and license sports gambling. The 2014 Law repealed this entire scheme.”¹¹⁴

Here, the emphasis was that the 2014 Law is very different from the 2012 Law and should be treated as such by the Court.

¹¹¹ *Id.*

¹¹² *Id.* at 271.

¹¹³ *Id.*

¹¹⁴ *Id.* at 272.

IV. RECENT DEVELOPMENTS: ANOTHER CHANCE FOR NEW JERSEY

As of October 15, 2015, the Court's 2015 decision in *NCAA v. Governor of New Jersey* was vacated after a majority of active judges voted for a rehearing *en banc* after petition by New Jersey, likely meaning that all twelve of the active judges on the Third Circuit will be involved in the next decision.¹¹⁵ It is important to note that while the decision for an *en banc* hearing does void the Third Circuit panel opinion, the original court decision in *Christie II*, holding that New Jersey's repeal statute was in violation of PASPA, remains in effect until a new decision is handed down.¹¹⁶ However, the decision for an *en banc* hearing has to be seen as very significant and an extraordinary move by the Third Circuit; of over 5,000 appeals decided in the Third Circuit in 2013 and 2014 combined, only three of those were considered *en banc*.¹¹⁷ Using the split decisions in *Christie I* and *Christie II* as an indicator, it can be expected that another split amongst the judges on the panel is on the way.¹¹⁸

A. Problems with the Latest Ruling and Changing Public Opinion

Currently, the New Jersey Division of Gaming Enforcement considers sports wagering to be a "non-gambling activity."¹¹⁹ Congressional intent should be viewed differently in light of this. Recently, there has been a swing in sentiment from the professional leagues over sports wagering. The NBA commissioner has spoken in favor of legalization, while the MLB commissioner has also said the current stance needs "fresh consideration."¹²⁰ Despite this changing tide of opinion elsewhere, the NCAA remains staunchly against sports betting of any form.¹²¹

¹¹⁵ *NCAA v. Rebeck*, Nos. 14-4546, 14-4568, 14-4569, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015).

¹¹⁶ Grange95 (@grange95), *New Jersey Sports Betting En Banc Rehearing: Everything You Wanted To Know*, LEGAL SPORTS REPORT (Oct. 26, 2015, 3:42 PM), <http://www.legalsportsreport.com/5262/new-jersey-sports-betting-en-banc/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (provides analysis and reasoning why judge split should be expected).

¹¹⁹ *NCAA v. Governor*, *supra* note 81, at 271 (see footnote 20).

¹²⁰ Adam Silver, Opinion, *Legalize and Regulate Sports Betting*, N.Y. TIMES, Nov. 13, 2014, at A27; David Purdum, *MLB to Talk Betting with Owners*; ESPN (Feb. 5, 2015), http://espn.go.com/chalk/story/_/id/12286521/mlb-commissioner-rob-manfred-says-legalized-sports-betting-needs-fresh-consideration.

¹²¹ See *NCAA Position on Sports Wagering*, NCAA, <http://www.ncaa.org/enforcement/sports-wagering> ("The NCAA opposes all forms of legal and illegal sports wagering, which has the potential to undermine the integrity of sports contests and jeopardizes the welfare of student-athletes and the intercollegiate athletics community").

One factor possibly contributing to the NCAA's opposition is the economic landscape of these respective sporting bodies. Amateur athletes technically stand the most relatively to gain from any match-fixing or point shaving scandals, since they are not compensated nearly as much as their counterpart professional athletes in the major sports.¹²² A recent Ninth Circuit ruling threw out a previous proposal that would've allowed colleges to pay athletes up to a meager \$5,000.¹²³ However, professional athletes, and even referees and other officials, are much more compensated than what they were even 20 years ago.¹²⁴ For example, in 1990, the average salary for a Major League Baseball player was \$578,930, and the minimum salary was \$100,000.¹²⁵ In 2015, these salaries checked in at \$4,250,000 and \$507,500, respectively.¹²⁶ Over the same timeframe, the salary cap for National Basketball Association (NBA) teams has also increased by nearly seven times.¹²⁷ The risk versus reward balance of taking part in such scandals has greatly shifted from the times of Shoeless Joe Jackson or even Pete Rose.¹²⁸ Long gone are the days where Mafiosi with deep pockets waited in the shadows to lure uneducated baseball players into a bigger payout than that of what they were already receiving. This likely sheds light as to why the NCAA continues to be heavily against legalized betting, since its athletes remain in a financial environment that has remained unchanged over the years where they do not receive compensation beyond scholarships and basic expenses and would therefore be more susceptible to being enticed by the promise of financial gain.¹²⁹ A 2013 study found that an astonishing 86 percent of NCAA athletes live in poverty, while the average fair market value of a Division I football or basketball player sat at \$121,048 and \$265,027, respectively.¹³⁰ In light of this, some irony might

¹²² See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> ("In general, amateurism requirements do not allow...[c]ontracts with professional teams, [s]alary for participating in professional athletics, [p]rize money above actual and necessary expenses").

¹²³ See Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html?_r=0.

¹²⁴ *Minimum Salary*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Minimum_salary (last visited Apr. 1, 2016); See also *NBA Salary Cap History*, REALGM, http://basketball.realgm.com/nba/info/salary_cap (last visited Apr. 1, 2016).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See generally *id.*

¹²⁹ See *Amateurism*, *supra* note 122.

¹³⁰ Matt Hayes, *Report concludes 86 percent of student athletes live in poverty*, SPORTING NEWS (Jan. 16, 2013), <http://www.sportingnews.com/ncaa-football-news/4465460-student-athletes-poverty-paid-scholarships-ncpa-texas-duke>.

be found in the NCAA citing the “integrity of sports contests” and “welfare of student-athletes” as reasons for such staunch opposition to sports betting.¹³¹

The advent, exploding popularity, and upheld legalization of daily fantasy sports (DFS) illustrate this shift even more. Regarding the skill versus chance debate that was brought to the forefront in the recent DFS cases, it's easy to also find hypocrisy in legal state lotteries which predominately affect poorer and less-educated demographics and provide much poorer odds in comparison to someone who would take the time to study advanced sports statistics to make an educated wager on a sporting event. Since its nadir in popularity during the Prohibition era, state-operated lotteries have been created in over 40 states since New Hampshire started the wave of change in 1964.¹³² A practical reason behind this embracing of state lotteries as an exclusive form of state-sponsored gambling is its virtual guarantee of profits and level of control. David Schwartz, director of the Center for Gaming Research at the University of Nevada-Las Vegas, explained this reasoning by saying, “[i]n lotteries, as long as you're not a total idiot, you should be able to set the payouts to ensure you make money. Sports gambling would be hard for the states to run because it is very possible, when running a sports book, to lose money.”¹³³ This juxtaposition raises serious public policy questions as to why sports wagering continues to face such scrutiny. In addition, the moral and social objections raised by the leagues are more difficult to agree with as DFS and fantasy sports in general become a virtual pastime for many Americans.

Similar to the lottery comparison, a recent examination into DFS reveals that for the casual and common player, the odds of winning are also significantly diminished.¹³⁴ One analysis found that, in a pool of roughly 20,000 players, the top 10 players combined to win an average of 873 times daily, while the remaining field averaged on 13 wins per day.¹³⁵ Additionally, 36 percent of lost entry fees on one DFS site came from just 5 percent of the players.¹³⁶ In a casino-sanctioned and regulation sports betting scheme, a participant's risk for heavy losses are mitigated, since they are betting against the house rather than other participants who may have a sophisticated advantage.

¹³¹ *NCAA Position on Sports Wagering*, *supra* note 121.

¹³² Will Hobson, *Sports gambling in U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html.

¹³³ *Id.*

¹³⁴ See generally Joshua Brustein & Ira Boudway, *You Aren't Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK (Sept. 10, 2015, 1:00 PM), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>.

¹³⁵ *Id.*

¹³⁶ *Id.*

Recent news has also revealed that the lack of regulation on sports betting presents another danger in insider trading and employee fraud. In October 2014, news broke of a DraftKings employee accidentally published data revealing which players were included on the most rosters for an NFL DFS contest and in the same weekend, the employee finished second in a contest on FanDuel, winning \$350,000.¹³⁷ This sparked enough interest for the Department of Justice and FBI to enter into preliminary stages of an investigation into both DraftKings and FanDuel.¹³⁸ In moves that may signal more change to come, the Attorneys General for Illinois, California, and New York have all since issued rulings declaring that DFS games constitute gambling and are in violation of PASPA, thereby effectively banning any DFS companies from conducting operations within their states while further litigation awaits.¹³⁹ The Illinois Attorney General focused on the state's criminal code and its interpretation, which defined gambling as "knowingly play[ing] a game of chance or skill for money," therefore making the distinction between a game of chance and a game of skill irrelevant.¹⁴⁰ The New York Attorney General's office has gone a step further, making court filings on New Year's Eve of 2015 requesting the court to order that FanDuel and DraftKings both be required "[t]o pay damages caused, directly or indirectly, by the fraudulent and deceptive acts and repeated fraudulent acts and persistent illegality complained of herein," and "[t]o make restitution of all funds obtained from consumers in connection with the fraudulent, deceptive, and illegal acts complained of herein."¹⁴¹

Another common criticism of legalized sports betting is that it would effectively be little more than a regressive tax targeted at poorer and less-educated demographics. In response to Minnesota's betting legislation, Minnesota Freedom Foundation spokesperson called the bill "nothing more than a tax on the poor" and that it would lead to "the expansion of

¹³⁷ David Purdum, *Report: DOJ, FBI enter preliminary stage of investigating daily fantasy*, ESPN (Oct. 16, 2015), http://espn.go.com/chalk/story/_/id/13890127/departments-justice-fbi-preliminary-stages-investigating-daily-fantasy-sports.

¹³⁸ *Id.*

¹³⁹ Dustin Gouker, *No Rest During Holidays, New Year For Daily Fantasy Sports Issues In Illinois, New York, California*, LEGAL SPORTS REPORT (Jan. 2, 2016, 9:51 AM), <http://www.legalsportsreport.com/7093/dfs-in-illinois-new-york-california/>; see also Letter on Sports and Gaming, Op. Ill. Att'y Gen. (Dec. 23, 2015), available at <http://www.legalsportsreport.com/wp-content/uploads/2015/12/Illinois-DFS.pdf>.

¹⁴⁰ See Letter on Sports and Gambling, *id.* at 7-9.

¹⁴¹ Gouker, *supra* note 139.

government and not the private sector.”¹⁴² However, studies from the Fantasy Sports Trade Association suggest otherwise; in comparison to the general population of the United States, 16 percent of those with household incomes of \$50,000 or more are fantasy sports participants, while only 10% of the population with household incomes less than \$50,000 are active in fantasy sports.¹⁴³ This contrasts greatly with the demographics of state lottery players, where “those in the lowest fifth” in terms of socioeconomic status (SES) had the “highest rate of lottery gambling (61%) and the highest mean level of days gambled in the past year (26.1 days).”¹⁴⁴ Moreover, there were “very few observed differences in lottery gambling for those in the three upper SES groups — 42–43% gambled on the lottery and the three upper groups averaged about 10 days of gambling on the lottery in the past year.”¹⁴⁵

Tax revenue from DFS companies and legalized sports betting would create a financial windfall for the government, with the said revenue stemming from higher-income citizens using much more “skill” than is required by walking up to a cash register, buying a handful of low-odds tickets, and crossing their fingers. To give an idea of the revenues being generated by DraftKings and FanDuel (the two leading DFS websites), these two companies spent a combined \$200 million on television advertising alone in 2015, at one point having an ad on national television every ninety seconds for three weeks straight.¹⁴⁶ In the first week of the NFL season alone, the two websites were projected to rake in \$60 million in entry fees.¹⁴⁷ DFS betting notwithstanding, recent analysis has shown that, despite the well-established markets in European countries and elsewhere, the United States could dominate a global legalized sports betting market.¹⁴⁸ Even when done in mostly illegal forums, bettors in the United States were expected to wager \$95 billion on NFL and college football.¹⁴⁹ In addition,

¹⁴² Peter Amsel, *Minnesota Sports Bet Bill Reborn*; CALVINAYRE.COM (Feb. 10, 2015), <http://calvinayre.com/2015/02/10/business/minnesota-sports-bet-bill-reborn/>.

¹⁴³ *Numbers at a Glance*, *supra* note 17.

¹⁴⁴ Grace M. Barnes et al., *Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan*, NPH PUBLIC ACCESS, 579 (Dec. 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103646/pdf/nihms595678.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ Davey Alba, *Does Winning at Fantasy Sports Require Skill or Dumb Luck?*, WIRED (Oct. 17, 2015, 7:00 AM), <http://www.wired.com/2015/10/does-winning-at-fantasy-sports-require-skill-or-dumb-luck/>.

¹⁴⁷ Brustein, *supra* note 134.

¹⁴⁸ David Purdum, *Research shows U.S. could dominate global legalized sports betting market*, ESPN (Sept. 9, 2015), http://espn.go.com/chalk/story/_/id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market.

¹⁴⁹ *Id.*

one global gambling research firm has estimated that a fully developed legal American betting market “would produce \$12.4 billion in annual revenue,” in comparison to the approximately \$7.2 billion in league revenue shared by NFL teams in the 2014 fiscal year.¹⁵⁰

Were New Jersey to completely repeal bans as suggested by the Third Circuit, what would prevent the court or the leagues from then equating this to a complete authorization? The dissent is correct in calling out the double standard that has been established. This also goes against the original anti-commandeering principles that were discussed in the 2012 decision. New Jersey is effectively left with no options, and the dissent in *Christie I* appears to be correct in its assessment.

V. CONCLUSIONS

Without more state action, Congress needs to reexamine the PASPA legislation to provide a regulated environment for legal sports wagering. The economic benefits certainly outweigh the costs in this case, especially with the shifting of public opinion. New Jersey should still continue to attempt to craft legislation to legalize sports betting, and should consider a complete repeal, if only to spur Congress to act to correct what would result as a completely unwanted situation of entirely unregulated betting. Were New Jersey to resort to such a drastic measure, an injunction would almost be certain to follow, and then a new decision would have to be crafted to work around the Third Circuit’s reasoning from *Christie I*.

It appears the recent wave of support for regulated sports wagering coming from the commissioners of America’s professional sports leagues could be enough for the upcoming *en banc* hearing to yield a different result. In a November 2013 op-ed to the New York Times, NBA commissioner Adam Silver explicitly stated that Congress “should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.”¹⁵¹ Echoing this sentiment, former NBA commissioner David Stern gave his backing to Silver’s statement, saying it was “clear where we were headed. The course was set. But it was left for Adam to make a direct statement of where it was going and I think he did the right thing.”¹⁵² Considering the contrast of acceptance between DFS and standard sports betting by the sports leagues, the significance of this changing tide of opinion should not be underestimated.

Generally, sports betting has become more ingrained into American sports culture in recent years; sports entertainment kingpin ESPN regularly

¹⁵⁰ *Id.*

¹⁵¹ Silver, *supra* note 120.

¹⁵² Amsel, *supra* note 142.

features betting advice columns and podcasts, including a weekly betting-themed podcasts called “Behind the Bets,” in which “ESPN Insider Chad Millman explores the culture of sports gambling.”¹⁵³ In 2015 alone, six states - Indiana, Minnesota, Mississippi, New York, South Carolina and Texas – have all considered sports betting legislation.¹⁵⁴ Michigan’s legislators have gone on the record to state the obvious pros of a legal and regulated market.¹⁵⁵ State Representative Robert Kosowski said of the bill, “[w]e need to come up with unconventional methods to help fund our roads,” while Representative Scott Dianda looked at it from another angle, adding, “[t]here’s bookies everywhere. We all know that. So why not regulate it? Why not get some money for this?”¹⁵⁶ However, the House Bill introduced has been written in terms that do not appear intent on challenging current federal law.¹⁵⁷

For guidance in implementing a successful sports betting scheme, the United States could look to the United Kingdom. In 2012-13, the UK government received 1.7 billion GBP in betting and gambling duties.¹⁵⁸ Of course, it’s likely most of this revenue would go to the states’ coffers instead in the US. In July 2014, Parliament adopted sweeping tax changes across the gambling sector in order to combat the impact online and offshore betting was having on on-site operations as well as lost tax revenues.¹⁵⁹ At the time, fewer than one-fifth of online gambling companies available to British customers held licenses with whitelisted, or accepted, territories.¹⁶⁰ To combat this wave of change, the UK government passed to Gambling (Licensing and Advertising) Bill 2014, which abolished the previous tax scheme and in its place created a “point of consumption” tax.¹⁶¹ This comes in the form of a “general betting duty” of fifteen percent levied on the bookmaker’s profits, regardless of the betting exchange’s

¹⁵³ See *Behind the Bets with Chad Millman*, ESPN, <http://sports.espn.go.com/espnradio/podcast/archive?id=5395837>.

¹⁵⁴ Purdum, *MLB to Talk Betting with Owners*, *supra* note 118.

¹⁵⁵ Emily Lawler, *Sports betting could help fix Michigan roads, bill sponsor says*, MLIVE.COM (Oct. 16, 2015, 7:39 AM), http://www.mlive.com/lansing-news/index.ssf/2015/10/sports_betting_could_help_fix.html.

¹⁵⁶ *Id.*

¹⁵⁷ See H.R. 4669, 114th Cong. (2015).

¹⁵⁸ Mona Chalabi, *UK’s gambling habits: What’s really happening?*, THE GUARDIAN (Jan. 8, 2014, 11:52 AM), <http://www.theguardian.com/news/datablog/2014/jan/08/uks-gambling-habits-whats-really-happening>

¹⁵⁹ See Joe Attard, *New UK gambling law explained: What’s all the fuss about?*, RIGHTCASINO (Oct. 2, 2015, 4:28 PM), <http://www.rightcasino.com/news/new-uk-gambling-law-explained/>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

location, provided that the bet was placed by a UK person.¹⁶² This was a major change from the system set in place by the 2005 Gambling Act, which taxed offshore gambling companies at the “point of supply” by the territory in which the operation was based.¹⁶³ A similar structure would entitle state governments and potentially the federal government access to these tax revenues, which would likely be significantly greater given the larger population size of the US along with the popularity of sports in general. As a way of combatting moral opposition that would be present in legalization, states could use the tax revenues on sectors such as public services, infrastructure, or education.¹⁶⁴ To provide an example, the Ohio Lottery paid \$803.1 million to its education fund in the 2013 fiscal year.¹⁶⁵

In the specific case of Atlantic City and New Jersey, the legalization of sports betting could result in the next boom of revenue for its economy, but the question remains this: how will it be differentiated and continue to maintain a profitable infrastructure if sports betting ultimately becomes legalized across the country, or even in multiple states, as seems to be the eventual likely course? With illegal online betting already prevalent throughout the country, the potential impact should be closely examined before the state gets too far ahead of itself. But public policy in the 21st century dictates that the time for a legal sports betting industry in the United States is coming very soon. At the very least, the legalization of on-site betting would go a long way in creating a similar job industry as to that currently present in the UK. Even with baseball’s past issues with gambling, Rob Manfred has also conceded that “[g]ambling in terms of our society has changed its presence on legalization.”¹⁶⁶ With the powers that be in sports seemingly in favor of change along with a rapidly changing tide of public opinion, there are fewer and fewer lines of reasoning other than stubbornness and semantics to explain keeping sports betting on the outside

¹⁶² *General Betting Duty, Pool Betting Duty and Remote Gaming Duty*, HM REVENUE AND CUSTOMS, (Aug. 28, 2015), <https://www.gov.uk/guidance/general-betting-duty-pool-betting-duty-and-remote-gaming-duty>. (“Profits” defined as “stakes received (from UK people where appropriate) less winnings paid out (to UK people where appropriate).”)

¹⁶³ Attard, *supra* note 159.

¹⁶⁴ See OHIO CONST. art. XV, § 6 (“The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.”).

¹⁶⁵ *Transfer History*, THE OHIO LOTTERY, <https://www.ohiolottery.com/SupportingEducation/Funding-Education/Transfer-History> (last visited Feb. 16, 2016).

¹⁶⁶ Purdum, *supra* note 120.

looking in. Regardless of the impact that legalization would potentially have or not have on its fledgling casinos, revenues from a legal and highly regulated betting scheme would provide great benefits for both New Jersey, as well as other states, and regulated sports betting schemes would provide an opportunity to boost economies of states and municipalities in need of a jump start.

